

General

30 MAR 1983

OGC 83-02639

MEMORANDUM FOR: See Distribution

FROM:

[redacted]
Acting Chief, Legislation Division, OGCSUBJECT: Draft General Services Administration (GSA)
Bill re Access by National Archives and
Records Services to Restricted Records

Attached for your information, review, and comment is a draft bill by the GSA which seeks to amend title 44 of the United States Code to allow employees of the National Archives and Records Service to have access to records of federal agencies which are under statutory restrictions or which are security classified.

Last year the Office of Management and Budget (OMB) requested our views on a similar GSA bill, as well as two other draft bills concerning records management. A copy of the letter which we sent to OMB expressing our views on this bill is attached for your use. Also attached is a copy of the bill as it was proposed in the 97th Congress. You will note that in response to our concerns that NARS employees have the necessary security clearances, the draft bill this year requires security clearances for those employees who would have access to any restricted or classified records.

Please review the amended version of the draft bill to see whether we should oppose this legislation on the grounds that it would still serve to undermine the DCI's statutory responsibility to protect intelligence sources and methods. OMB has requested our views on this bill no later than 14 April. Therefore, please relay your comments on this bill, in writing or by telephone, to [redacted] Legislation Division, Office of General Counsel, [redacted] by COB 11 April.

Attachments

Distribution:

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CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

General Counsel

OGC 82-04256
29 April 1982

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This is in response to a request by the Office of Management and Budget for the views of the Central Intelligence Agency on three draft General Services Administration (GSA) bills which would amend title 44, United States Code, to clarify certain responsibilities of the Administrator of GSA concerning records management. For the reasons outlined below, the Central Intelligence Agency objects to each of these draft bills.

The first draft bill would amend section 2904 of title 44, United States Code, to give the Administrator of GSA the sole authority to determine whether a particular document, recording, or other item is a "record" as defined in section 3301 of title 44. Such a grant of authority is objectionable as it would allow the Administrator to declare as "records" many items that in the past have not generally been deemed to have such status. Our experience with GSA and the National Archives and Records Service (NARS) to date has been generally cooperative. We currently use NARS guidelines in determining whether or not Agency items are "records." When questions have arisen concerning sensitive operational records, agreements have usually been reached through negotiation, and we have acceded to NARS staff determinations when there has been no direct conflict with Agency authorities or the responsibility of the Director of Central Intelligence for the protection of intelligence sources and methods. We cannot, however, support any legislation which would jeopardize the ability of the Director of Central Intelligence to carry out his statutory responsibility for the protection of intelligence sources and methods pursuant to section 102(d)(3) of the National Security Act of 1947 and section 403g of the Central Intelligence Agency Act of 1949.

In addition, current GSA regulations allow "nonrecords" to be disposed of by agency authority alone, whereas disposal of "records" requires prior approval of the Archivist of the

United States. If the Administrator of GSA were the sole authority as to what items were "records," destruction of material could be unduly delayed because an agency would have to seek affirmation that specific items were clearly not records so that they could be destroyed.

The second draft bill would amend section 3303a of title 44, United States Code, to eliminate the current requirement that the Administrator of General Services obtain the prior written consent of the head of an agency before disposing of records that had been in the custody of that agency prior to their transfer to GSA custody. Instead, the Administrator would be required only to seek the agency head's advice regarding disposal. The amendment would, therefore, effectively place any CIA records in the custody of GSA under total control of the Administrator of General Services. Such a result would run directly counter to the statutory responsibility of the Director of Central Intelligence for the protection of intelligence sources and methods. The proposed amendment would preclude the DCI from invoking the so-called "third agency rule" [The rule is recognized in section 3.1 of Executive Order 12356, and a regulation of the Information Security Oversight Office published at 32 C.F.R. § 2001.33(a)(3)(1981).] to protect CIA information which might be contained in the records of other agencies in GSA custody. This would directly impair the DCI's ability to protect intelligence sources and methods.

The third draft bill would add a new section 2115 at the end of chapter 21 of title 44, United States Code, which would have the effect of giving the Archivist and NARS personnel unlimited access to classified CIA records regardless of whether these persons have, or even qualify for, security approvals or clearances. This amendment would seriously undermine the DCI's ability to limit access to sensitive intelligence information on a strict need-to-know basis, and it therefore directly contravenes the DCI's statutory responsibility for the protection of intelligence sources and methods. Furthermore, this amendment would render nugatory section 4.1 of Executive Order 12356 which specifies restrictions on access to classified information.

For the foregoing reasons, and because we do not believe that normal security requirements have heretofore been a serious impediment to the exercise of NARS' responsibilities insofar as the Central Intelligence Agency is concerned, we vigorously oppose these draft bills. Given the objections we have expressed above, we would appreciate being kept closely informed as to the formulation of an Administration position on this legislation.

Sincerely,



Stanley Sporkin

A BILL

To amend title 44, United States Code, to clarify archival authorities for restricted records.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Chapter 21 of title 44, United States Code, is amended by adding a new section 2115 at the end thereof as follows:

"§2115. Archival access to restricted records

"Notwithstanding any restrictions on access imposed by statute or Executive Order, the Archivist and persons employed by the National Archives and Records Service of the General Services Administration with appropriate national security clearances who are engaged in archival work shall be permitted access to restricted records for purposes of—

- (1) accessioning those records into the National Archives of the United States and preserving them under chapter 21 of this title;
- (2) inspection of an agency's records program under chapter 29 of this title; and
- (3) determining, under chapter 33 of this title, whether the records have or will have sufficient value to warrant their continued preservation by the Government.

Sec. 2. The table of contents for chapter 21 of title 44, United States Code, is amended by adding the following entry at the end thereof:

"2115. Archival access to restricted records."

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A BILL

To amend title 44, United States Code, to clarify archival authorities for restricted records.

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Sec. 1. Chapter 21 of title 44, United States Code, is amended by adding a new section 2115 at the end thereof as follows:

"§2115. Archival access to restricted records

"Notwithstanding any restrictions on access imposed by statute or Executive Order, the Archivist and persons employed by the National Archives and Records Service of the General Services Administration who are engaged in archival work shall be permitted access to restricted records when carrying out their duties except for the provision of reference service to the general public under chapters 21, 29, and 33 of this title."

Sec. 2. The table of contents for chapter 21 of title 44, United States Code, is amended by adding the following entry at the end thereof:

"2115. Archival access to restricted records."